

Case Summary

Bruce Smith appeals the denial of his petition for post-conviction relief. We affirm.

Issue

Smith raises one issue, which we restate as whether he received ineffective assistance of appellate counsel based on counsel's failure to raise an issue related to the victim's identification of him.

Facts

On September 16, 1997, Dorothy Easterday awoke and found Smith asleep on the floor of her bedroom. The two scuffled, Smith demanded money, and he then shot at Easterday. The gun misfired, Smith shoved Easterday, and he fled from her house. Easterday reported the incident to the police. Shortly thereafter, Smith was apprehended. Easterday was informed that Smith had been caught and was asked to identify him. Approximately two hours after the incident, Easterday rode in a police car to a church parking lot where she observed Smith sitting in the front seat of a marked police car. Easterday identified Smith as the attacker.

On September 18, 1997, the State charged Smith with Class A felony attempted murder, Class A felony burglary while armed with a deadly weapon resulting in serious bodily injury, two counts of Class B felony burglary, and two counts of Class D felony theft. Smith was also charged with three counts of Class B felony attempted burglary. These charges arose out of the incident involving Easterday and a string of other burglaries and attempted burglaries.

During the jury trial, trial counsel objected to Easterday's identification of Smith. The objection was overruled, and Smith was convicted as charged. Smith filed a direct appeal, and his convictions were affirmed. He subsequently filed a petition for post-conviction relief, which included a claim that he received ineffective assistance of appellate counsel. This petition was denied, and Smith now appeals.

Analysis

Smith contends that the post-conviction court improperly denied his petition for post-conviction relief. When appealing from the denial of post-conviction relief, the petitioner appeals a negative judgment. Cornelious v. State, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), trans. denied. We will not reverse unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

Smith argues that appellate counsel's representation was ineffective because she did not appeal the issue of Easterday's pretrial and in-court identifications of Smith. We review claims of ineffective assistance of appellate counsel under the same standard as claims of ineffective assistance of trial, and Smith must show appellate counsel was deficient in her performance and that the deficiency resulted in prejudice. See Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006). To satisfy the first prong, Smith must show that counsel's performance fell below an objective standard of reasonableness and that counsel committed errors so serious that he did not have the "counsel" guaranteed by the Sixth Amendment. See id. To show prejudice, Smith must show a reasonable probability that but for counsel's errors the result of the proceeding would have been

different. See id. “If we can easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel’s performance was deficient.”¹ Eichelberger v. State, 852 N.E.2d 631, 634-35 (Ind. Ct. App. 2006), trans. denied.

Smith claims that the “show up” was unduly suggestive. Even if we were to assume that was the case, we do not agree that there was no independent basis for Easterday’s in-court identification of Smith. “Notwithstanding an unduly suggestive pre-trial procedure, in-court identification is nonetheless admissible ‘if the witness has an adequate independent basis for [the] in-court identification.’” Logan v. State, 729 N.E.2d 125, 131 (Ind. 2000) (quoting Brown v. State, 577 N.E.2d 221, 225 (Ind. 1991), cert. denied, 506 U.S. 833, 113 S. Ct. 101) (alteration in original). The factors the court considers in determining whether an independent basis exists include: the amount of time the witness was in the presence of the perpetrator and the amount of attention the witness had focused on the perpetrator, the distance between the two and the lighting conditions at the time, the witness’s capacity for observation and opportunity to perceive

¹ Our supreme court has recently observed, “It is thus fairly common practice in Indiana to address only the prejudice prong, as it frequently represents a short cut. Doing that may save time, but it can also degrade the post-conviction process into a super appeal, just the thing we say post-conviction is not.” Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). We do not believe that addressing the prejudice prong in this context turns Smith’s petition for post-conviction relief into a super appeal because our determination is limited to a review of the evidence of Easterday’s identification of Smith. Further, in Smith’s seventy-page brief on direct appeal, he raised ten issues. To determine whether the identification issue was significant and obvious from the face of the record and whether it was “clearly stronger” than the raised issues under the deficient performance prong, Burnside v. State, 858 N.E.2d 232, 238-39 (Ind. Ct. App. 2006), would have required an extensive and unnecessary review of the record.

particular characteristics of the perpetrator, and the lapse of time between the crime and the subsequent identification. Id. at 131-32.

At trial, Easterday testified that she woke up at 4:30 a.m. when her alarm clock went off. She was home alone with her dog. She did not turn her bedroom light on and walked toward the hall to let the dog outside. She tripped on something lying between her bed and the hall and reached into the hall to turn the light on. When she turned the light on, she saw Smith lying on her bedroom floor. Easterday demanded to know who he was and why he was in her house. Smith offered an explanation. Easterday told Smith she was going to call 911. Smith grabbed her and told her she was not calling 911. Smith told Easterday to give him her money or he would shoot her. Smith pointed the gun at her chest. They were standing “very close,” facing each other. Tr. p. 585. The gun “clicked” two or three times, but Easterday was not shot. Id. They started scuffling, and moved down the hall toward the front door. Smith shoved Easterday into the front door and pushed her out of the way. Easterday testified that she had ten to fifteen minutes to observe Smith while he was in her home. She testified that she clearly remembered Smith as the man who was in her home.

Easterday had a significant amount of time in which to observe Smith and focused her attention entirely on him while he was in her home. Easterday stated that she turned on the hall light and that they were close to one another, close enough for Smith to put his hands on her. Further, there is no indication that Easterday had a physical or mental impairment, other than being frightened during the incident, that affected her ability to identify Smith. Finally, the trial was held in April 1998, approximately seven months

after the September 1997 burglary. Although that it is not an insignificant amount of time, relatively speaking, the trial was held soon after the attack.

These facts lead us to conclude that Easterday had an independent basis for her in-court identification of Smith. Accordingly, even if Easterday's pre-trial identification was based on an unduly suggestive "show up," any error is harmless because her in-court identification was admissible. Smith has not shown that he was prejudiced by appellate counsel's failure to raise this issue on direct appeal. Thus, he has not established that the post-conviction court improperly denied his petition for post-conviction relief.

Conclusion

Smith has not established that the evidence leads to a conclusion opposite that reached by the post-conviction court. Id. The post-conviction court properly denied his petition for post-conviction relief. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.